Shamelin Holdings Sdn Bhd v Mohd Anhar bin Ahmad (trading as ABA Architect)

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–24–03 OF 2004
RAUS SHARIF J
20 APRIL 2006

Arbitration — Arbitrator — Powers of arbitrator — Whether arbitrator could award pre-award interest

Arbitration — Award — Setting aside — Application — Finding of facts by the arbitrator — Whether arbitrator has properly analysed and appraised the evidence — Whether error of law appeared on the face of the award

Two originating summons arising from similar facts, involving the same parties were filed. In originating summons No R1–25–233 of 2003, the application was by Shamelin Holdings Sdn Bhd ('the applicant') under s 24(2) of the Arbitration Act 1952 ('the Act') to set aside the arbitration award of Mr Sundra Rajoo ('the arbitrator') made on 18 November 2003. In originating summons No R1–24–03 of 2004, the application was by Mohd Anhar bin Ahmad (a sole proprietor carrying out the business as ABA Architect) under s 27 of the Act for leave to enforce the same arbitration award. It was agreed between the parties that the applicant's application in R1–25–233 of 2003 to be heard first and the decision in that case bind the respondent's application in R1–24–03 of 2004.

Held, dismissing the applicant's application with costs and allowing the respondent's application:

(1) The findings of the arbitrator are findings of facts. It is an established law that in cases of this nature the court's jurisdiction is limited in that it has no jurisdiction to sit in appeal and examine the correctness of the award on merit. The court's function is not to re-hear the matter but to determine whether there is error of law on the face of the award (see *Syarikat Pemborong Petamac & Federal Land Development Authority* [1971] 2 MLJ 210; *Hotel Contractors Ltd v Hartecon JV Sdn Bhd* [1999] 2 MLJ 481; *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401). Thus, looking at the award as a whole, the arbitrator has properly analysed and appraised the evidence and he has not drawn any wrong inferences of fact from the evidence including the documents incorporated in the award (see para 15).

(2) The arbitrator has the discretion to award pre-award interest. Hence, there is no error on the part of the arbitrator when he awarded pre-award interest. Infact, the arbitrator in making the award on pre-award interest was guided by established precedents in cases of *Lian Hup Manufacturing Co v Unitata Bhd* [1994] 2 MLJ and *Raja Lope v Malaysian Flour Mills Bhd* [2000] 6 MLJ 228 (see para 18).

[Bahasa Malaysia summary

Dua saman pemula yang membangkitkan fakta-fakta yang sama, melibatkan pihak-pihak yang sama telah difailkan. Permohonan saman pemula No R1–25–233 tahun 2003 adalah oleh Shamelin Holdings Sdn Bhd ('perayu') di bawah s 24(2) Akta Timbangtara 1952 ('Akta tersebut') untuk mengetepikan award penimbangtara Encik Sundra Rajoo ('timbangtara tersebut') yang dibuat pada 18 November 2003. Permohonan saman pemula No R1–24–03 tahun 2004 ialah oleh Mohd Anhar bin Ahmad (tuanpunya tunggal berdaftar yang menjalankan perniagaan sebagai ABA Architect) di bawah s 27 Akta tersebut untuk kebenaran menguatkuasakan award penimbangtara tersebut. Adalah dipersetujui di antara pihak-pihak bahawa permohonan perayu No R1–25–233 tahun 2003 didengar dahulu dan keputusan kes tersebut akan mengikat permohonan responden No R1–24–03 tahun 2004.

Diputuskan, menolak permohonan perayu dengan kos dan membenarkan permohonan responden:

(1) Penemuan penimbangtara adalah penemuan fakta-fakta. Adalah undang-undang mantap dalam kes-kes yang bersifat sebegini, bidang kuasa mahkamah adalah terhad iaitu ia tiada bidang kuasa untuk mendengarkan rayuan dan meneliti sama ada betulnya award tersebut di atas merit. Fungsi mahkamah bukannya untuk mendengar semula perkara tersebut tetapi untuk memastikan samada terdapat kekhilafan undang-undang pada zahir award tersebut (lihat *Syarikat Pemborong Petamac & Federal Land Development Authority* [1971] 2 MLJ 210; *Hotel Contractors Ltd v Hartecon JV Sdn Bhd* [1999] 2 MLJ 481; *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401). Dengan melihat award tersebut secara keseluruhan, penimbangtara telah menilai dan mengkaji dengan wajarnya bukti-bukti dan beliau tidak membuat inferens yang salah dengan fakta daripada bukti-bukti termasuk dokumen-dokumen yang dimasukkan ke dalam award (lihat perenggan 15).

(2) Penimbangtara mempunyai budi bicara dalam memberikan faedah pra-award. Dengan itu tiada kesalahan dipihak penimbangtara apabila beliau mengawardkan faedah pra-award. Sebenarnya penimbangtara dalam memberikan faedah pra-award dibantu oleh doktrin duluan yang kukuh dalam kes-kes *Lian Hup Manufacturing Co v Unitata Bhd* [1994] 2 MLJ dan *Raja Lope v Malaysian Flour Mills Bhd* [2000] 6 MLJ 228 (lihat perenggan 18).]

Notes

For cases on setting aside award on arbitration, see 2(1) consolidated subject index & table of cases *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1428–1429.

Cases referred to

Chandris v Isbrandtsen Mooler Co Inc All ER [1950] 2 618 (refd)
Hotel Contractors Ltd v Hartecon JV Sdn Bhd [1999] 2 MLJ 481 (folld)
Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401 (folld)
Leong Kum Whay v QBE Insurance (M) Sdn Bhd [2006] 1 MLJ 710 (refd)
Lian Hup Manufacturing Co v Unitata Bhd [1994] 2 MLJ 51 (folld)
Raja Lope Tan Co v Malaysian Flour Mills Bhd [2000] 6 MLJ 228 (folld)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (folld)

Legislation referred to

Arbitration Act 1952 ss 24(2), 27

T Gunaseelan (Gunaseelan & Associates) for the applicant.
Ramdas Tikamdas (Siva Ras & Associates) for the respondent.

Raus Sharif J:

[1] Two originating summons arising from similar facts involving the same parties were filed before this court. In originating summons No R1–25–233–03, the application was by Shamelin Holdings Sdn Bhd ('the applicant') under s 24(2) of the Arbitration Act 1952 ('the Act') to set aside the arbitration award of Mr Sundra Rajoo ('the arbitrator') made on 18 November 2003. In originating summons No R1–24–03–04, the application was by Mohd Anhar bin Ahmad (a sole proprietor carrying out the business as ABA Architect) under s 27 of the Act for leave to enforce the same arbitration award.

[2] It was agreed between the parties that the applicant's application in R1–25–233–03 to be heard first and the decision in that case will bind the respondent's application in R1–24–03–04.

[3] The facts leading to these two applications are as follows.

[4] By an agreement dated 19 May 1995, the applicant appointed the respondent to provide professional architectural services for the following projects:

(i) Twin tower of 38 storey consisting of office and hotel ('Twin Tower Project');

(ii) A 22 storey office tower, subsequently converted to 15 Storey Hostel Block for Maktab Sains Mara ('Hostel Project'); and

(iii) Shamelin Management Office ('Management Office Project').

[5] On 20 April 1998, the respondent terminated his appointment as the architect for the above projects on grounds of non payment of fees.

[6] The respondent's claims before the arbitrator were in relation to bills issued for the professional services rendered by the respondent for the respective projects which are as follows:

Twin Tower Project

(i) Bill No 0035 dated 24 April 1998 for RM845,802.00

Hostel Project

(i) Bill No 0033 dated 8 December 1997 for RM34,049.53; and

(ii) Bill No 0036 dated 1 July 1998 for RM15,000.00.

Management Office Project

(i) Bill No 0037 dated 1 July 1998 for RM15,000.00

[7] The applicant disputed the respondent's claims. The applicant's version was that in early 1995 a consortium comprising of individuals headed by a person by the name of Haji Radzi Haji Wahi made a representation to the applicant to construct a twin tower building on the applicant's land with a projected profit of RM95m. Based on this representation, the applicant agreed to appoint the respondent (a member of the consortium) as the architect subject to the condition that the payment of fees is conditional upon the respondent and the consortium obtaining an en block purchaser for the Twin Tower Project. Since the respondent would not be paid for the Twin Tower Project unless the en block purchaser is found, the applicant appointed the respondent as the architect for the Hotel Project and the Management Office Project to assist the respondent.

[8] According to the applicant, the respondent was paid for the bills for the Hostel Project and Management Office Project. However, no payment was made by the applicant to the respondent in respect of the Twin Tower Project. The applicant maintains that the fees in respect of the architectural works relating to the Twin Tower Project was not due and payable because there was a collateral agreement that an en block purchaser would be secured by the consortium.

[9] In any event, according to the applicant, the works by the respondent in respect of the Twin Tower Project was carried out negligently or not as expected of an architect. In respect of the claim relating to the Hostel Project and the Management Office Project, the applicant contended that the respondent misrepresented and induced the applicant to release payment of fees in excess of what the respondent was entitled to. Further according to the applicant, the respondent was negligent in executing the architectural work in respect of Hotel Project and Management Office Project.

[10] The issues for determination before the arbitrator were:

(i) Was there a collateral agreement whereby the respondent promised secure an en block purchaser for the twin towers and that the payment of the

architectural fees was conditional upon the respondent securing an en block purchaser for the twin towers:

(ii) Whether the respondent had completed the drawings and documents at a stage ready for submission to the relevant authorities, safe for the final adjustments, coordination and correction to be made;

(iii) Whether the respondent was negligent in carrying his work in relation to the Twin Towers Project, the Hotel Project and Management Office Project;

(iv) Whether the respondent had by misrepresentation induced the applicant to release payment of fees in excess of what was actually due to the respondent; and

(v) Whether pre-award interest can be awarded.

[11] The arbitrator found in favour of the respondent. Before me, it is the contention of the applicant that the arbitrator in favouring the respondent had misconducted himself within the meaning of s 24(2) of the Act. The applicant further contended that there are errors on the face of the award which merited the award to be set-aside.

[12] With deepest respect, I am unable to hold as such. With regard to the alleged collateral contract, the arbitrator found that the respondent's appointment as the architect for the Twin Tower Project was in pursuant to the agreement dated 19 May 1995. The arbitrator stated that:

> There is no substratum of fact at all for the issue of the alleged 'collateral contract' to be considered. The respondent's assertion of a collateral contract remain bare devoid of any evidence in support of it. It is merely a red-herring and a sham without any substance and foundation whatsoever.

[13] With regards as to whether the respondent had completed the drawings and documents were ready for submission to the relevant authorities, the arbitrator held as follows:

(i) In respect of the Twin Tower Project:

> I have looked at all the evidence given and submitted upon by both parties. In particular, I have considered and evaluated them carefully. I find and hold the Architectural Drawings as produced in CBA 44A sheet 1–17 had reached the stage of practically ready for submission to the relevant authorities as they had reached 80% of Schematic Design Phase.

He further stated:

> I find and hold the said drawings had reached the state practically ready for submission to the relevant authorities. I confirm the veracity of the claimant's evidence on this item.

In respect of the Hotel Project:

> I find no reason to doubt the veracity of the figures submitted by the claimant leading to his claims and find that the respondent had not produced any evidence to rebut the claim. Based on the above, I find and hold as regards to the Hostel Project that claimant is entitled to payment of RM34,049.53 vide Bill No 0033 dated 8th December 1997 and RM15,000.00 vide Bill No 0036 dated 1st July 1998.

[14] With regards to the alleged negligence of the respondent in carrying out his works, the arbitrator held:

> ... I find the Drawings were at a stage ready for submission to the relevant authorities save for some final adjustments, coordination and correction to be made as identified by the claimant in his evidence … As the claimant is only claiming 75% of the Schematic Design Phase, I find that all these adjustments will be *inter alia* part of the remaining part to be done in the course of the work when the drawings are being submitted to DBKL.

[15] Clearly, the above findings of the arbitrator are findings of facts. It is an established law that in cases of this nature the court's jurisdiction is limited in that it has no jurisdiction to sit in appeal and examine the correctness of the award on merit. The court's function is not to re-hear the matter but to determine whether there is error of law on the face of the award (see *Syarikat Pemborong Petamac & Federal Land Development Authority* [1971] 2 MLJ 210; *Hotel Contractors Ltd v Hartecon JV Sdn Bhd* [1999] 2 MLJ 481; *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401). Thus, looking at the award as a whole, it is my view that the arbitrator has properly analysed and appraised the evidence and he has not drawn any wrong inferences of fact from the evidence including the documents incorporated in the award.

[16] Another issue raised by the applicant is the award on pre-award interest. According to the applicant the arbitrator has no jurisdiction to award pre-award interest. This is because of s 21 of the Act which provides only for post-award interest.

[17] The respondent submitted otherwise. Reference was made to the English Court of Appeal of of *Chandris v Isbrandtsen Mooler Co Inc All ER* [1950] Vol 2 618 and the recent case of our Court of Appeal in *Leong Kum Whay v QBE Insurance (M) Sdn Bhd* [2006] 1 MLJ 710 where it was decided to the effect that the awarding of pre-award interest was an 'established practice having the force of law'.

[18] I have no reason to depart from the principle established in the above two cases. Clearly the arbitrator has the discretion to award pre-award interest. Hence, there is no error on the part of the arbitrator when he awarded pre-award interest. In fact the arbitrator in making the award on pre-award interest was guided

by established precedents in the cases of*Lian Hup Manufacturing Co v Unitata Bhd* [1994] 2 MLJ 51 and *Raja Lope Tan Co v Malaysian Flour Mills Bhd* [2000] 6 MLJ 228.

[19] In conclusion, I have no reason to interfere with the award of the arbitrator. The arbitrator has not misconducted himself within the meaning of s 24(2) of the Act nor is there any error on the face of the award which entitled me to set-aside the award. The applicant's application in R1–25–233–03 is hereby dismissed with costs. Consequently the respondent's application in R1–24–03–04 is allowed with costs.

Respondent's application allowed with costs.

Reported by Sally Kee